



Comptroller General
of the United States

835306

Washington, D.C. 20548

Decision

Matter of: Fantasy Lane, Inc.

File: B-254072.3

Date: June 23, 1994

Richard Suter for the protester.

Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency.

Robert C. Arsenoff, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegation that solicitation was defective for failing to include detailed information concerning listed products for which alternate products could be offered is dismissed as untimely since the alleged defect was apparent from the face of the solicitation and, thus, had to be raised prior to the time set for receipt of initial offers.

2. Protest allegation that agency improperly determined that protester's offered alternate product was not equivalent to listed-approved products is denied where protester failed to address agency's concern that the unique chemical composition of its product would adversely affect its functionality.

DECISION

Fantasy Lane, Inc. (FLI) protests the rejection of its offer under request for proposals (RFP) No. DLA450-93-R-2127, issued by the Defense Logistics Agency (DLA) for indirect electrostatic toner cartridges. The protester principally contends that the agency improperly determined that its offered alternate product was not equivalent to the approved products specified in the RFP.

We dismiss the protest in part and deny it in part.

DLA issued the RFP on May 12, 1993, and subsequently amended it to extend the closing date to June 21. The item description listed the approved products of Canon USA, Inc. (a manufacturer), and American Laser Products, Inc. (ALP), and Cartridge Technology Network (CTN) (remanufacturers).

Pursuant to the "Products Offered" clause,¹ offerors were required to specify whether they were offering an "exact product" as listed in the item description, or an "alternate product."

Offerors of alternate products were cautioned that their products "must be identical to or physically, mechanically, electrically, and functionally interchangeable" with the products specified in the item description. They were further advised that "[n]either detailed specifications nor other data may be available for use in evaluating the technical acceptability of [alternate products]" and they were, therefore, required to furnish all data necessary to clearly describe the characteristics and features of the product being offered (and of the listed products) in order to demonstrate equivalency with the listed products. In addition, offerors of products previously furnished to the government or otherwise evaluated and approved were requested to indicate the contract number under which such products were furnished or evaluated and to identify the contracting activity; however, they were also advised that DLA might not have access to information from other activities sufficient to support a determination that an alternate product was equivalent to a listed product. Finally, the Products Offered clause stated that failure to furnish complete data to sufficiently establish acceptability of an alternate product might preclude consideration of the offer.

FLI submitted the lowest offer of the 12 received. In its offer, FLI specified that it was offering its own alternate remanufactured toner cartridge. FLI further indicated that its product had been furnished to or evaluated and approved by the General Services Administration (GSA) under contract No. GSA-00F-6587A. FLI also submitted a material safety

¹Defense Logistics Acquisition Regulation § 52.217-9002.

²DLA investigated this information and found that FLI had been awarded a New Item Introductory Schedule contract by GSA; however, no testing of its product had occurred incident to that contract. FLI has also argued that it provided DLA with a list of its Department of Defense customers for cartridges; however, as pointed out by DLA, the list refers to a different type of cartridge than the one being purchased under the instant RFP. Thus, to the extent that FLI suggests that DLA acted unreasonably in failing to consider this customer information when evaluating the acceptability of its alternate product, we find no merit to the protester's position. We, therefore, confine our analysis to the reasons specified by DLA for the (continued...)

data sheet (MSDS) with its offer,³ as well as an explanation of how its remanufacturing process was performed.

Negotiations were opened on December 20. FLI was specifically advised that its alternate offer had been forwarded to DLA's engineering staff for evaluation but that the anticipated 90 days for testing and evaluation might preclude consideration of the offer, since there was a pressing demand for cartridges. Accordingly, FLI was encouraged to submit an offer for one of the approved products.

Revised offers were received on December 28. FLI continued to offer its alternate product. Although FLI believed this product had been approved, DLA advised the firm on January 4, 1994, that this was not yet the case. On the same day, FLI wrote to DLA stating: "Our cartridges are EP-S cartridges as described in your [solicitation]." Best and final offers were received by January 6.

On January 7, the engineering staff determined that FLI's alternate product was unacceptable because it did not have an extended-life drum and the firm had not demonstrated that it performed post-production tests on its products. Following an agency-level protest of this determination, the engineering staff decided to reevaluate FLI's product and invited the firm to submit technical data in support of its alternate product. In response, FLI resubmitted its MSDS and the description of its remanufacturing process which accompanied its initial offer.

On January 21, the engineering staff found FLI's product to be unacceptable because of its unique chemical composition. When compared to Canon's approved product,⁴ which contained

²(...continued)

rejection of the firm's alternate product--i.e., failure to be functionally equivalent to the listed products.

³The MSDS contained, among other things, a chemical analysis of the toner employed by FLI.

⁴As the agency reports, a subsequent comparison to ALP's approved product yielded the same results. Although no comparison was apparently performed with respect to CTN's approved product, the protester has been provided with that firm's MSDS and has not asserted that its product is equivalent to CTN's based on the data contained therein.

approximately as much iron-oxide as FLI's but also contained significant amounts of styrene-acrylic and styrene copolymers not present in the protester's toner, FLI's product was questioned because it contained no copolymers (instead, its non-iron oxide components were carbon black and silicon dioxide). The engineering staff noted that, despite these significantly different compositions, FLI had submitted no data showing that its toner was the functional equivalent of approved toners; more specifically, the staff noted that FLI had failed to establish that the unique chemical composition of its product would have no adverse effect on the product's functionality in terms of uniformity of print, ghosting, or pages printed per cartridge.

On January 25, FLI was specifically advised of these findings and informed that its offer would no longer be considered. This protest followed.

As an initial matter, FLI alleges that the "brand name or equal" RFP lacked a list of salient characteristics against which alternate products were to be evaluated. This procurement was not conducted on a brand name or equal basis but, rather, was conducted under the Products Offered clause discussed in detail above. Thus, the protester's arguments (continued through its comments on the agency report) concerning the application of legal principles applying to brand name or equal procurement are simply misplaced. To the extent that the protest may be read as asserting that the RFP failed to contain adequate information concerning the approved products to intelligently formulate an acceptable alternate offer, it is untimely since protests of such alleged solicitation improprieties must be raised prior to the time set for receipt of initial proposals, in this case June 21, 1993. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1994); Alfa Kleen, B-252743, July 26, 1993, 93-2 COD ¶ 55. Accordingly, this aspect of the protest is dismissed.

FLI also alleges that the MSDS and description of the remanufacturing process, together with its January 4 statement of compliance with the technical specifications of the RFP, constitute sufficient information to demonstrate that its alternate product is technically equivalent to the specified approved products.

The obligation to demonstrate the acceptability of an alternate product is on the offeror. Accordingly, an offeror must submit sufficient information with its

alternate offer to enable the contracting agency to determine whether the item is functionally equivalent to the specified approved products. We will not disturb the agency's technical determination unless it is unreasonable. Alfa Kleen, supra.

Here, we have no basis upon which to conclude that the agency's rejection of FLI's alternate product was unreasonable or to find that the protester has been effectively precluded from establishing the equivalency of its product. The description of FLI's manufacturing process and its January 4 blanket statement of compliance with the RFP do not bear on the final reason stated by the agency for rejecting its product--an unexplained unique chemical composition which agency officials believed could impair the functionality of the product.

Nor do we find that FLI's MSDS standing alone supports the protester's position that its product was equivalent to the approved products. Indeed, it was FLI's MSDS, in comparison to the MSDSs of the approved products, which revealed the chemical differences resulting in the rejection of FLI's offer. During the course of this protest, FLI was provided with the MSDSs of the approved manufacturers' products and has yet to demonstrate how the unique composition of its alternate product affects, or fails to affect, its functionality. While the protester has asserted that its product is functionally equivalent to the approved products, it has provided no evidence in support of this assertion.

The protest is dismissed in part and denied in part.

/s/ John M. Melody
for Robert P. Murphy
Acting General Counsel